

Testimony of Representative Edward J. Markey (D-MA)  
Before the House International Relations Committee  
Hearing on India Nuclear Deal  
May 11, 2006

Good morning Chairman Hyde, Ranking Member Lantos and Members of the International Relations Committee. Thank you for giving me the opportunity to testify today.

I am opposed to the Administration's legislative proposal to grant India a special exemption from our nation's nuclear nonproliferation laws. I believe that this legislative proposal is ill-conceived, that it undermines U.S. national security interests, and that it sets a dangerous precedent that will be exploited by our adversaries and rivals. But I also believe that this proposal seriously weakens Congress's role in overseeing and approving the terms of nuclear trade, and I want to focus my testimony on this point.

Protecting America's national security interests is more important than party loyalties or a few reactor deals for the nuclear industry. I would also suggest to my friends in the Indian-American community that it is a mistake to try to make a nuclear reactor deal the centerpiece of a stronger bilateral relationship. A lasting partnership between the world's oldest and the world's largest democracies is a great idea, and one that I strongly support. But it cannot be built on a faulty foundation. That is precisely what will happen if nuclear energy cooperation is made the centerpiece of the new U.S.-Indian relationship.

It would be short sighted to forget that today's hearing takes place amidst the backdrop of a critical struggle to address Iran's nuclear ambitions. As we debate the details of an exceptionalist policy for a rule-breaking nation outside of the Nuclear Non-proliferation we cannot forget that the world is watching. Other nations are taking close note of the nuclear precedent that this Congress is about to establish.

The focus of this hearing is the Administration's proposed legislation. Mr. Chairman, in your invitation to the hearing, you suggest that the Atomic Energy Act must be amended in order for the deal negotiated by the Administration to go through. Let me suggest that there is a way for the Committee to consider this deal, its benefits and its risks, in a deliberative fashion, and consider appropriate conditions on that deal, that do not require you to amend the Atomic Energy Act at this time.

Let me explain. Under Section 123 of the Atomic Energy Act, the President already has the ability to submit to Congress a formal Agreement for Nuclear Cooperation between the U.S. and India. The President has this power, notwithstanding the fact that India does not meet the requirement in Section 123 (a)(2) that it allow full-scope safeguards at all of its nuclear facilities.

All the President has to do to submit such an Agreement to the Congress is to make a determination that inclusion of the full-scope safeguards "would be seriously prejudicial to the achievement of U.S. nuclear nonproliferation interests or would otherwise jeopardize the common defense and security." If the India nuclear deal is as important as its supporters claim, if the proposed "separation" plan is really credible from a nonproliferation standpoint, if the common defense and security benefits of the proposed strategic relationship are so compelling, then why is the Administration unable or unwilling to make such a determination?

Some might argue that Section 129 of the Act also poses an obstacle, as it provides that one basis for a cessation of nuclear cooperation with another country is conducting a nuclear explosive test after March 10, 1978, which India has done. Now, I suppose you could pass a bill to change the date so that the test series that the Indians did in 1998 would be grandfathered. But strictly speaking, you really don't need to do so. The President already has the legal authority to waive Section 129, if he determines that halting such exports "would be seriously prejudicial to the achievement of U.S. nuclear nonproliferation interests or would otherwise jeopardize the common defense and security." So my question again is why isn't the White House willing to use this waiver authority? Why aren't they willing to make those determinations? It isn't as if this were an Administration that was exactly shy about using its executive authority. In fact, they seem to find authority to do things they want to do even when Congress says they should not.

So why aren't they using the authority they already have right now? Why don't they go out, negotiate a nuclear cooperation agreement with the Indian Government, submit it to the Congress, and let this Committee review it and determine whether to approve it and if so, what conditions the Committee believes need to be added to the agreement.

Let me suggest a possible answer. The Administration wants to avoid the enhanced scrutiny that Congress envisioned for Nuclear Cooperation Agreements which fail to comply with requirements established in the Nuclear Nonproliferation Act (NNPA) of 1978, a law enacted in response to the 1974 Indian nuclear test – a test conducted using nuclear materials produced in violation of peaceful uses pledges made to the United States and Canada.

The NNPA added a new Section 123 to the Atomic Energy Act. Section 123 a. of the Act includes nine criteria for approval of a nuclear cooperation agreement that has not been worked out yet, and the Administration's legislation would exempt India from the safeguards requirement. But it does far more than that.

The Administration bill also stipulates that any future agreement for nuclear cooperation between the U.S. and India "shall be subject to the same congressional review procedures" used for agreements that have "not been exempted from any requirement contained in section 123(a)." This means that the non-conforming India agreement would be considered under a procedure normally reserved for agreements that comply with all of the requirements of the Atomic Energy Act.

This reminds me of the old cartoon of the bear in Yellowstone Park looking for handouts by the side of the road under a sign which reads "Do Not Feed The Bears." The bear has hung a sign around his neck which reads "I Am Not A Bear!"

Like the bear, the Administration wants us to treat this as a conforming agreement even if it is not.

What happens if -- in addition to failing to agree to full-scope IAEA safeguards requirement -- the future U.S.-India Nuclear Cooperation Agreement also fails to agree to any of the other eight nuclear nonproliferation and security criteria that U.S. law (Section 123) already mandates? These include guarantees that:

- 1) safeguards on nuclear material and equipment transferred continue in perpetuity;

- 2) nothing transferred is used for any nuclear explosive device or for any other military purpose;
- 3) the U.S. has the right of return if the cooperating state detonates a nuclear explosive device or terminates or abrogates an IAEA safeguards agreement;
- 4) there is no transfer of material or classified data without U.S. consent;
- 5) physical security is maintained;
- 6) there is no enrichment or reprocessing without prior approval;
- 7) storage is approved by the U.S. for plutonium and highly enriched uranium; and,
- 8) anything produced through cooperation is subject to all of the above safeguards.

A memorandum prepared by the Congressional Research Service, a copy of which is attached to my testimony, notes that:

“It is possible that the 30-day consultation with committees could resolve any issues related to the agreement’s meeting the other 8 criteria under Section 123 A., but the proposed legislation, does not include specific provisions for Congress to reject the President’s determination that the agreement meets all of the requirements but Section 123 a. (2).”

The concern I raise about the failure is not merely academic in nature. In 1985, I joined with former Representative Solomon (R-NY) to oppose President Reagan’s proposed Nuclear Cooperation Agreement with China, because that agreement failed to include the guarantees that the law requires with respect to transfers of nuclear material or technology to other countries. We knew at the time that China had been providing covert nuclear assistance to Pakistan, and the only “guarantee” that the U.S. received on transfers was a vague statement made in an after dinner toast in Beijing. But the Reagan Administration submitted the China Agreement as a conforming agreement. They ran the clock on us, and the best we could do was to try to put in place some nonproliferation certifications into an approval resolution. As it turned out even these de minimus conditions prevented the deal from going into effect for 13 years.

Under the law, a nuclear cooperation agreement which conforms with all of these requirements will go into effect unless both the House and the Senate pass a joint resolution within 90 days to disapprove of the agreement. Inaction by either House, or a failure of both Houses to move legislation before the 90-day time clock expires, therefore results in the agreement going into effect by default. Furthermore, such a joint resolution of disapproval would have to be signed by the President and therefore will likely face a veto, essentially requiring a veto-proof two-thirds majority vote in both Houses to prevent such an agreement from entering into force.

The Bush Administration’s India legislation therefore sets up the possibility -- and I would suggest the distinct probability -- that Congress will be asked to vote on these sweeping exemptions before it has even seen the final text of the actual bilateral Nuclear Cooperation Agreement, before we have actually seen the text of any IAEA safeguards agreement, and then never actually have an opportunity to vote on the actual U.S.-Indian nuclear cooperation agreement. What if the Indians refuse to agree to a U.S. right of return? What if they refuse to provide adequate security? What if the safeguards aren’t really permanent? What if India won’t agree to prior U.S. consent for retransfers? If this Committee approves the proposed bill, you will have virtually no leverage to respond. By approving the existing legislation you are effectively eliminating Congressional oversight on nuclear cooperation –permanently. The

Administration can go to its allies in the House and Senate, go to the Leadership, and simply ask them to run out the clock.

In addition, the Administration's legislation, by treating this unfinished, yet-to-be-seen, yet-to-be-signed Nuclear Cooperation Agreement as a Section 123 compliant Agreement, also removes subsequent annual Congressional reviews of nuclear exports that would otherwise be required under Section 128 of the Act.

That requirement is what allowed Jonathan Bingaman and I to offer a resolution to block the Tarapur fuel deal back during the Carter Administration – with the support at the time of both you, Mr. Chairman, and Vice President Cheney. The Tarapur fuel deal ultimately went through when the Senate failed to block it, but at least we followed regular order and had a debate and a vote.

The Administration apparently has deemed this Congressional exercise of its powers to regulate foreign commerce to be “too cumbersome.” I would submit that such Congressional reviews serve as an important check on executive excesses. But under the Administration bill, just to be sure Congress cannot step in to examine such subsequent arrangements, the Administration's proposed bill grants the President broad, unfettered authority to waive all of Section 128 of the Act. He doesn't have to make any nonproliferation or security determinations – as would be required under existing law. He can waive at will.

The Administration could wait and submit the future nuclear cooperation agreement with India as a nonconforming agreement. In this case, it could not go into effect until both bodies had carefully reviewed the merits of the agreement and adopted resolutions by a simple Majority vote to approve it. This process allows the Congress to either block agreements that are not in our nation's national security or nonproliferation interests, or to attach conditions or limitations on such agreements to preserve important U.S. nonproliferation interests.

The Administration is essentially asking this Committee to approve a nuclear cooperation agreement that has not been worked out yet, and they would like you to surrender your prerogatives to review subsequent exports carried out pursuant to this Agreement – as provided for under existing law.

But there's more, the Administration bill also grants the President unfettered discretionary authority to waive the sanctions which are provided for under Section 129 of the Atomic Energy Act – so that even if India violates the Agreement, even if India kicks out the IAEA, even if it diverts U.S.-origin nuclear material or technology to its weapons program, or even if it helps another country acquire nuclear weapons, the President is free to continue supplying India with nuclear materials and technology. Now why is that? Could it be related to the odd and unprecedented promise made in the March 2<sup>nd</sup> Separation Agreement that the U.S. would secure India with a fuel supply in perpetuity?

There is no rush to make such drastic changes to U.S. law. It makes no sense for Congress to approve a nuclear cooperation agreement that hasn't yet been negotiated. Congress should wait to see the final text of the Nuclear Cooperation Agreement that the Bush Administration signs. Congress should also wait to see the details of the IAEA safeguards agreement. Will nuclear fuel be safeguarded from cradle-to-grave? Will IAEA inspectors have unfettered access to facilities? These are critical details that Congress should consider before changing U.S. law. The precedents that are set with this agreement will not necessarily be limited to India. Why

should any non-weapons state that has actually signed the NPT and agreed to abide with full-scope safeguards, agree to any of the requirements of Section 123 if the U.S. has previously waived them with respect to India?

And what are the international implications of proceeding down this path? How can the U.S. plausibly argue at the U.N. Security Council for a tough stance on Iran's violation of its IAEA safeguards agreement if it is simultaneously moving forward to engage in nuclear trade with a country that has refused to even sign the NPT or agree to full-scope safeguards?

How will U.S. be able to turn back a future Chinese effort to grant Pakistan the same special exemptions from international nuclear nonproliferation rules that the Administration wishes to create for India?

And if, as the Administration bill proposes, each Member of the Nuclear Suppliers Group is free to determine for itself whether India is in compliance with the broad nonproliferation "principles" that the Administration has suggested, what is to prevent Russian, French and other nuclear vendors to engage in a race to the bottom in search of reactors deals in South Asia?

The Administration would like Congress and the American people to believe that agreeing to this deal is an urgent matter. It is not. The Administration would like us to believe that expanding India's nuclear power capabilities will free-up oil for the U.S. This deal has nothing to do with oil. In 2005, only 1% of India's installed electrical capacity was fueled by oil and only 2.7% by nuclear power.

India has real energy needs, but it does not need nuclear power plants to meet these needs. Len Weiss, who is also testifying here today, has said that "... an aggressive program of improved energy efficiency could substitute for all the future power output from nuclear reactors currently being planned in India between now and 2020."

Coal currently constitutes 55% of India's electricity generation. India has the world's 4<sup>th</sup> largest coal reserves, but India's coal is dirty. It has a high ash content. Approximately 600,000 children die of acute respiratory infection in India every year. India has an estimated 20 million asthma patients, most of them children. Pilot studies by the USAID were able to reduce emissions from 50 year old coal plants by a factor of 50!

Throughout the next century, Coal will continue to be the major player in India's electricity sector. India plans to build an additional 213 coal plants by 2012. These plants will produce the bulk of India's electricity. A realistic, safe, and practical plan for partnership between the United States and India would be a Clean-coal cooperative, not a nuclear one.

I urge this Committee to reject the Administration's proposed bill, and to ensure that any India nuclear cooperation deal is considered under the procedures set forth under existing law. In this way, Congress can consider the issue of "conditions" on the India nuclear deal after it has actually reviewed the terms of the proposed deal itself.

Thank you.